IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. .....

VI MURPHY,

Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI.

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January 23, 1961

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Vi Murphy prays that a writ of certiorari issue to review two orders of the Supreme Court of the State of Colorado.

The first order below convicted petitioner of contempt of court and ordered her committed. Petitioner, a newspaper reporter, had declined, in a proceeding to suspend an attorney from practice pending disbarment proceedings, to disclose the confidential source of an advance copy of a petition filed by the attorney in the Supreme Court of the State of Colorado. The petition, the substance of which was later published by the reporter in The (Colorado Springs) Gazette Telegraph, charged a former judge of the Colorado Supreme Court with accepting a bribe. The second order below denied a "Petition to Vacate Contempt

Order" filed by petitioner. The court below rendered no opinion with respect to either of these orders.

This is the first case in which a state court has ever ordered the forced disclosure of confidential news sources against the claim that such forced disclosure would violate the Constitutional guarantee against state action of freedom of the press.* It is only the second case ever holding that a court's power to compel testimony in judicial proceedings overrides rights arising from the protection afforded to freedom of the press by the First Amendment. *Garland* v. *Torre*, 259 F. 2d 545 (2d Cir. 1958), *cert. denied*, 358 U. S. 910.

Jurisdiction.

The court's order holding petitioner in contempt and imposing sentence (Tr. 61-2**) is dated and was entered on October 26, 1960 and is printed as Appendix A hereto.

On October 31, 1960, petitioner filed in the Colorado Supreme Court her "Petition to Vacate Contempt Order" (Tr. 70-72), which is printed as Appendix B hereto. That petition was denied by order (Tr. 122-3) of the Colorado Supreme Court dated and entered November 3, 1960, which order is printed as Appendix C hereto.

Jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

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* It is not, however, the first state case in which the disclosure of confidential news sources has been compelled. See cases cited at pp. 20-21, *infra*.

** Page references to the transcript of hearings below are introduced by the abbreviation "H. Tr."; references to the transcript of the remainder of the record are introduced by the abbreviation "Tr."

Questions Presented.

1. May a state court constitutionally impose restraints on the gathering of news, in view of the protection against state action afforded freedom of the press by the Fourteenth Amendment?

2. Does not the Fourteenth Amendment forbid the imposition of sanctions by a state court to compel disclosure of confidential news sources at least in the case where

— there has been no showing of great public necessity for the disclosure, and

— the disclosure sought to be compelled is not material or of substantial probative value to the proceeding in which it is sought?

Constitutional Provisions Involved.

The Constitutional provisions pertinent to this petition are the First Amendment and the Fourteenth Amendment, Section 1, to the Constitution of the United States:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement.

On September 16, 1960, the Colorado Attorney General made formal complaint to the Grievance Committee of the Colorado Supreme Court against John H. Gately, an attorney, seeking an investigation as to whether Gately should be disbarred (Tr. 2-4). The complaint alleged that Gately had filed a petition to vacate opinion and judgment for fraud in a case in which, the petition charged, a former Chief Justice of the Colorado Supreme Court had, while a member of the Court, accepted a bribe to influence or bring about the Court's decision. The complaint further alleged that Gately gave a copy to a reporter for The (Colorado Springs) Gazette Telegraph for the purpose of having the contents of the petition published therein, and that as a result the contents were published (Tr. 3). The complaint alleged, on information and belief, that the bribery charge was false and made without probable cause, and that Gately's actions were malicious, and designed to obtain publicity for himself and to discredit and bring disgrace upon the Colorado Supreme Court, and further that publication of the article "will tend to destroy public confidence in the administration of justice by the courts of this State" (Tr. 3-4).

The Colorado Supreme Court cited Gately to show cause why his license to practice law in Colorado should

not be suspended during the pendency of the proceedings for disciplinary action (Tr. 6).

At the hearing on the citation, Gately and other witnesses were questioned by the court, by the Attorney General and by Gately's attorney regarding the issues raised by the complaint. After hearing, the court on October 31, 1960 ordered Gately suspended from the practice of law in Colorado until further order of the court (Tr. 65).

At the hearing on September 23, petitioner, having been subpoenaed as a People's witness (Tr. 8), testified that she wrote the news story in question, with a copy of the petition before her, on the day (but before) Gately filed it in court (H. Tr. 76-8). She also testified that she obtained a copy of the petition from Gately at the time he filed it, but that she released her story for publication only after she had examined the petition filed in court and found it identical with her copy (H. Tr. 77-8, 249-50). She testified that she would not have released the story for publication until she had been permitted to read the record copy, without any condition that its contents be suppressed, for verification of her story (H. Tr. 250). She declined, however, to answer questions of the court whether or not she had obtained a copy of the petition from Gately, or from someone else, prior to the time the petition was filed in court (H. Tr. 74-5, 79, 140).

The hearing was recessed and was reconvened on October 26, 1960, when the court directed petitioner to answer the questions whether Gately gave or showed her a copy of the petition before filing it, and from whom she received an advance copy (H. Tr. 248-250). When petitioner declined to answer, she was adjudged in contempt of court, and sentenced to thirty days' imprisonment (H. Tr.

267-8). The court then granted leave to petitioner's attorney to file a brief (H. Tr. 270).

Although not represented by counsel before the court below until shortly before being held in contempt (H. Tr. 267-8), petitioner on two occasions based her refusal to answer the court's questions as to her source upon the freedom of the press as guaranteed by the First Amendment to the United States Constitution (H. Tr. 76, 255). Moreover, the "Petition to Vacate Contempt Order" (Appendix B hereto) was based in part on a claim of the protection against disclosure of a news source afforded by the Fourteenth Amendment to the Constitution of the United States.

The petition to vacate the contempt order, with supporting brief, was considered by the court on the papers and, with petitioner's motion for oral argument, was denied *en banc* on November 3, 1960 (Tr. 122-3). On November 10, 1960, this Court entered an order staying execution of the judgment pending the disposition of this petition for certiorari.

Reasons for Granting the Writ.

At stake here is the public's right to know the news—and the press' freedom to gather it.

This case presents a question of vital importance to every newspaper in the United States.

The Court below has imposed a sanction which will result in a direct and substantial impediment on the gathering of news. The further effect of its decision is to stifle and frustrate in particular the efforts of the press in one of its historical functions: to acquaint the community with charges of corruption in government.

Unless reversed by this Court, the decision below will have an immediate effect on the willingness of news sources

to transmit news in confidence to reporters and news media. It will lend aid to any forces seeking to choke off the flow of news to news media. Compulsory disclosure "may entail an abridgment of press freedom by imposing some limitation upon the availability of news."

In permitting this needless restraint on the gathering of news, the decision below is contrary to the policies enunciated by this Court on the necessity of protecting the flow of news along its entire length—from news sources to the public. It disregards the recognition by this Court that disclosures forced by state action, no less than direct state sanctions, may effectively abridge First Amendment rights protected by the Fourteenth Amendment. It is irreconcilable with the preferred place given by this Court to First Amendment rights.

The Colorado court has imposed the restraint in the first case on this issue in which the guarantee of freedom of the press insured by the Fourteenth Amendment has been claimed to override the interest of a State in compelling testimony in its judicial proceedings. The case resolves that conflict against the Fourteenth Amendment, though the testimony sought was in no way essential to the proceeding.

The communication of news to reporters on condition the source not be disclosed is a constant occurrence. Similarly, despite the comparative novelty of the issue here, the question whether such sources must be disclosed has been, and will continue to be, a frequently recurring one, both in the courts and in the legislatures.

The correct rule of law may be that the people's Constitutional right to a free press forbids compulsory disclosure of confidential news sources in every case, or that it does not forbid such disclosure in any case. The correct

rule may, on the other hand, lie somewhere between, in the "delicate and difficult" task of balancing Constitutional demands against competing interests.

The result of such a balancing process may well depend upon how necessary to the administration of justice is the testimony sought to be compelled. The kind of news made available by the confidential relationship may have a crucial significance in the balancing process: the public has, perhaps, a deeper interest in the publication of charges of malfeasance in office, than in learning that a prominent actress is known for a highly developed inferiority complex, and thinks she's fat.*

In any event, until this Court speaks, the correct rule cannot be known.

I.

Forced disclosure of confidential news sources is a real and dangerous restraint on news gathering.

The decision below affects with equal impact the large metropolitan daily and the small country paper. Both know that the decision imposes a serious practical obstruction to their gathering of news and will reduce in significant measure the news available to them.

The testimony in this case supports the common understanding that a great part of the news, particularly political news of wide public concern, is, for perfectly proper reasons, communicated to reporters on condition that the source not be disclosed. In such instances, refusal of the condition means refusal of the communication (H. Tr. 252-3).

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* See Joint Appendix, p. 10, *Torre* v. *Garland*, 358 U. S. 910.

To the extent that any rule of law renders such assurance unavailable or precarious, to that extent the flow of news to the public is pinched off at its source, and, *pro tanto,* the public's right to know is diminished.

An authoritive study has declared:

> "News channels which prove valuable in unearthing such examples of public scandals remain so only as long as the source remains secret. Honest officials, and occasionally dishonest persons, who can furnish necessary information, cannot afford to jeopardize their freedom or their jobs by permitting their names to be used.
>
> "No community can afford to shut off these channels of information, and no honest newspaper can afford to keep its reporters in hourly fear of contempt charges. • • •
>
> *"No information would be given if the informant did not have faith in the integrity of the reporter in the matter of withholding his name. The newspaper man would find his channels of news closed."* Siebert and Ryniker, Editor and Publisher, September 1, 1934, pp. 36-37. (Emphasis supplied.)

In twelve states—Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio, and Pennsylvania—the public interest in protecting news sources has been accorded express statutory recognition. Such legislation has been proposed in the Congress and in other states.•

• S. 965, 86th Cong., 1st Sess. (1959) and H. R. 355, 86th Cong., 1st Sess. (1959); as to states, see, e.g., S. Int. 79 and 1390 and A. Int. 42, 658, 810, 1070, introduced in the 1958 Session of the New York State Legislature, and House Bill 25, introduced in the 1959 Session of the Illinois General Assembly.

That forced disclosure of news sources seriously impairs the vitality of news gathering has, moreover, been repeatedly recognized in all free nations.

In summarizing the arguments made on behalf of protection of sources of information of news personnel, the Secretary General of the United Nations has written:

> "*Often scandal, corruption and malfeasance can be exposed publicly only if an informant is confident that his identity will not be disclosed.* Such anonymity may well be a part of an informant's bargain with a newspaper reporter * * *." United Nations Economic and Social Council, Document E/2693, p. 25 (1955) (Emphasis supplied.)

A noted Swiss authority has written:

> "*The most important materials would be lost to the press if the courts were permitted to search out the original author or sender or confidential source.*"*

The same thought has been expressed by the Director of the French Press Institute, who wrote:

> "Is not the right to secrecy concerning an informant a necessary condition for freedom of information? In fact, is there not the risk of drying up essential sources of information * * * if one cannot guarantee, at his request, the anonymity of an informant? And isn't it a normal and necessary part of a journalist's work to seek information from the most qualified sources even if those sources prefer to remain anonymous?" Terrou, *The Protection of Sources of Information for Journalists*, IPI Report, Bulletin of

* Gubler-Corti, *Zum Problem des Zeugnisverweigerungsrechtes der Journalisten* 203 (Switzerland 1957), quoting with approval from Keller, *Liability for Press Offenses.* (Translation supplied.)

the International Press Institute 2 (Zurich, Feb. 1958).

Protection of news sources has been accorded recognition in such diverse foreign jurisdictions as Pakistan, Sweden and the Philippines. See United Nations Economic and Social Council, Document No. E/2693, pp. 27-28 (1955).

Even those authorities not endorsing unqualified protection of news sources have fully recognized that such protection is an important constituent element of freedom of the press. Thus the late Zechariah Chafee stated:

> "* * * this power to make reporters disclose their confidential sources of information should be exercised with great caution. The power also applies to priests, as just stated, but few lawyers or judges would press a question to a priest after he had invoked his professional duty of silence. *It is similarly desirable to respect the reporter's claim of confidence except in cases of great necessity where he clearly possesses knowledge which is otherwise unobtainable.* Chafee, *Government and Mass Communications* 497 (1947)." (Emphasis supplied.)

And the New York Law Revision Commission, after completing an exhaustive study of the problems of protecting newsmen against disclosure of news sources, concluded:

> "The newsman's case differs from other cases where no privilege exists as to information obtained in confidence, in that *the newsman is performing the important function of keeping the public informed. A privilege to newsmen may therefore be justified when a privilege to others receiving information in confidence would not.*" 1949 Report of the Law Revision Commission 26. (Emphasis supplied.)

These authoritative voices, drawn from every corner of the globe where an unfettered press is recognized as a bulwark of the open society, make clear that the decision below will substantially impair the capacity of this country's press to gather the news.

II.

The First Amendment, and, as against State action, the Fourteenth Amendment, mandates against restraints at any stage of the flow of news to the public. The restraint authorized below strips from news gathering the essential protection of the Amendments.

In the past, press restraints have most frequently been sought to be applied at the stage of news dissemination. This Court has rigorously struck down each such attempted restraint. See, *e.g.*, *Near* v. *Minnesota*, 283 U. S. 697 (1931).

Judicial protection of the press has not been limited, however, to direct restraints on publication of the type illustrated by *Near*.

Freedom from forced disclosure of identity has already been accorded by the courts to the last step in the news-dissemination process—the communication from the publisher to the reader. In striking down an attempt to inquire into the identity of purchasers of certain books and pamphlets, the Court of Appeals for the District of Columbia stated:

> "To publicize or to report to the Congress the names and addresses of purchasers of books, pamphlets and periodicals is a realistic interference with the publication and sale of those writings. • • • There can be no doubt, in that case or in this one, that the realistic effect of public embarrassment is a powerful interference with the free expression of views.

• • •" *Rumely* v. *United States*, 197 F. 2d 166, 174 (D. C. Cir. 1952), *aff'd on other grounds*, 345 U. S. 41 (1953).

In the concurring opinion in this Court in the same case, it was forcefully said:

> "If the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship. • • • A requirement that a publisher disclose the identity of those who buy his books, pamphlets, or papers is indeed the beginning of surveillance of the press. • • • Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. • • •" 345 U. S. at 57.

Freedom from forced disclosure of the identity of those who distribute or sponsor handbills and booklets has also been sustained by this Court, which has said:

> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Talley* v. *California*, 362 U. S. 60, 64 (1960).

In the contexts of other First Amendment rights, this Court in recent decisions has taken note of the fact that forced disclosure of certain relationships may interfere as effectively with the exercise of the protected right as a direct governmental sanction against such exercise. In *Shelton* v. *Tucker*, 81 S. Ct. 247, 251 (1960), the Court said:

> "It is not disputed that *to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association*, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." (Emphasis supplied.)

Moreover, "[a]bridgement of such rights [of free speech, press and association], even though unintended, may inevitably follow from varied forms of governmental action." *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 461 (1958). See also *Bates* v. *Little Rock*, 361 U. S. 516, 522-23 (1960) and *Watkins* v. *United States*, 354 U. S. 178, 197-99 (1957).

With increasing frequency in recent years, attempted restraints on the press have been applied, not at the stage of the now clearly immune news-disseminating function, but instead at the very start of the news flow: the flow from the source to the press.*

This Court has already given substantial recognition to the principle that the First Amendment includes in its sweep the gathering of news. Thus, in *Associated Press* v. *United States*, 326 U. S. 1 (1945), this Court stated:

> "That [the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." 326 U. S. at 20.

Not only does the Amendment constitute a "command that the government itself shall not impede the free flow of ideas" (*ibid.*) but, this Court made clear, a restraint upon free access to the sources of news (although in that case by a non-governmental combination) was a restraint upon a "constitutionally guaranteed freedom." *Ibid.*

In equally compelling language, Mr. Justice Murphy in his dissent in that case stated:

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* See Wiggins, *Freedom or Secrecy* (1956), passim; see generally, Report of the Advancement of Freedom of Information Committee of Sigma Delta Chi [the professional journalistic society] (1957), pp. 12-17 (listing 63 instances of suppression of news at the source).

> "Nor can we escape the fact that *governmental action directly aimed at the methods or conditions of such collection or distribution is an interference with the press*, however differing in degree it may be from governmental restraints on written or spoken utterances themselves." *Id.* p. 51. (Emphasis supplied.)

See also *Associated Press* v. *KVOS*, 80 F. 2d 575 (9th Cir. 1935), *rev'd on jurisdictional grounds*, 299 U. S. 269 (1936).

News gathering and news dissemination are, in practice, inseparable aspects of a single publishing process. They should not be separable in law.

As a noted American reporter has stated:

> "The suggestion that freedom of reporting can exclude access to facts is extremely dangerous doctrine. The gleaning of facts is essential to knowledge, without which the right to publish is empty—and its exercise irresponsible."*

It is clear, under this Court's decisions that the due process clause of the Fourteenth Amendment protects against state action the basic freedoms, including freedom of the press, guaranteed by the First Amendment against abridgment by the federal government. *Near* v. *Minnesota*, 283 U. S. 697, 707 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243 (1936).

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* Dorothy Thompson, quoted in Douglas, *The Right of the People* 81 (1958). The author describes Miss Thompson's statement (of which the above is a part) as "stating in the finest American tradition the function of the reporter."

III.

The Colorado Supreme Court's holding cannot be reconciled with an unbroken line of decisions of this Court establishing the primacy of rights guaranteed by the First Amendment and the due process clause of the Fourteenth Amendment.

This Court stated in *Grosjean* v. *American Press Co., supra:*

> "The predominant purpose of the grant of immunity [of the First Amendment] here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern • • • *A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.*" 297 U. S. at 250 (Emphasis supplied).

When this Court has been called upon in the past to weigh First Amendment rights in the scales against other compelling rights, it has been fully cognizant of the unique nature of speech and press freedom. This Court has noted ". . . the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First

Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). And it has stated:

> ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." *Bridges* v. *California*, 314 U. S. 252, 265 (1941).

It has cautioned that in balancing conflicting rights and interests,

> ". . . we remain mindful of the fact that the latter [freedom of press and religion] occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulations . . . of the rights.'" *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946).

Decisions of this Court have made it clear that Constitutionally-protected freedoms of expression are rigidly circumscribed only when

> "• • • the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States*, 249 U. S. 47, 52 (1919).

A prior restraint on publication of charges against public officers of corruption or malfeasance of office is not justified on this ground, *Near* v. *Minnesota*, 283 U. S. 697, 716

(1931); nor may newspapermen be summarily punished for contempt when they intemperately criticize a judge's conduct of a case, since such criticism falls short of an "imminent * * * threat to the administration of justice," *Craig* v. *Harney*, 331 U. S. 367, 376 (1947). The "clear and present danger" limitation is not approached in this case.

In these decisions, this Court was not conferring special favors on a privileged industry. Instead, it was giving life and flesh to the basic assumption of a free society that an informed people can govern wisely. And it was confirming that, to assure that a people is adequately informed, the flow of news from the news source to the newsreading public must be left free of every dispensable restraint and obstruction.

The decision of the court below cannot be squared with this Court's doctrine of the preeminence of First Amendment rights. Nor can it be squared with the caution which this Court has consistently urged be exercised before any impairment of such rights be permitted.

IV.

The decision below sets a precedent for abridgment of Constitutional freedoms even in cases where the asserted countervailing State interest is inadequate on its face.

The disclosure sought by the Colorado Supreme Court in the proceeding below was neither material nor of substantial probative value.

Clearly, the answers sought from petitioner by the court below were relevant to its inquiry only if it were Gately, or someone acting under his direction, who supplied petitioner with the copy of the petition; the court was not

conducting a general investigation to find which person or persons should be proceeded against for having released in advance the copy of the petition to a newspaper reporter, but was instead attempting to determine whether Gately had done so.

Petitioner's testimony on this point, though seemingly related to the determination whether Gately "caused" the newspaper publication or made his charges maliciously, was for many reasons unnecessary to the court's decision. That it was unnecessary is obvious from the fact that, despite petitioner's refusal to testify, the court suspended Gately's license to practice until further order of the court, precisely the relief sought by the Attorney General in the proceeding below (Tr. 1, 84).

Moreover, Gately was questioned at length, and testified, on the matter (H. Tr. 42-50). The Colorado Attorney General argued in his brief below (Tr. 51), with considerable force, that the admission of Gately that he made a copy of the petition available to petitioner at the time he filed it in Court was "sufficient to show a desire to publicize himself or to discredit the Court"; if this contention is correct, it was immaterial whether he gave a copy to petitioner prior to that time.

In Colorado, the filing of grave charges against a judge by an attorney is in itself a sufficient basis for suspension from practice, where the court finds (as it apparently did here) that the charges are essentially baseless, and that the attorney failed to act with "that caution and circumspection which the gravity of the charges demanded." *People ex rel. Rogers* v. *Green*, 9 Colo. 506, 535, 13 Pac. 514, 528 (1887). In any event, the power of the Supreme Court of Colorado to disbar or suspend from practice a Colorado attorney is purely discretionary, *Colo. R. S.* § 12-1-8 (1953), and the court was able here to exercise its discretion

without the testimony it had unsuccessfully sought from petitioner.

This case is not at all, therefore, like *Garland* v. *Torre*, *supra*, where "[T]he question asked of the appellant went to the heart of the plaintiff's claim." 259 F. 2d at 550.*

Nor is it like those few state cases still authoritative in their respective jurisdictions in which an asserted privilege against disclosure of confidential news sources has been denied, since in *all* those cases, counterbalancing the public interest in protecting news sources, there was a strong public interest in both the subject matter of the litigation and, unlike this case, disclosure of the information sought.

Thus, the privilege has been denied where the nature of the information published would make its originator liable to disciplinary or criminal proceedings, and the person originating the information could not be determined without knowing the reporter's source**:

Clein v. *State*, 52 So. 2d 117 (Fla. 1951) (disclosure of source of news story revealing grand jury testimony and vote).

Plunkett v. *Hamilton*, 136 Ga. 72, 70 S. E. 781 (1911) (disclosure in police board proceeding of source of news story revealing details of police murder investigation).

Matter of Wayne, 4 U. S. D. C. Hawaii 475 (D. Hawaii 1914) (disclosure of source of news story revealing grand jury finding before it was reported to the court).

---

* *Cf. Brewster* v. *Boston Herald-Traveler Corp.*, 20 F. R. D. 416 (D. Mass. 1957), a libel action in which a newspaperman was ordered to disclose on deposition the source of a memorandum upon which his allegedly libelous editorial was in part based. The court found that disclosure might lead to admissible evidence on the issue of malice.

** *Cf. Pledger* v. *State*, 77 Ga. 242, 3 S. E. 320 (1887) (author of news article convicted of criminal libel after publisher was compelled to disclose author's identity).

Ex parte Holliway, 272 Mo. 108, 199 S. W. 412 (1917) (disclosure of source of news story revealing grand jury proceedings before their public announcement).

People ex rel. Phelps v. *Fancher*, 2 Hun 226 (N. Y. Sup. Ct. 1874) (disclosure of identity of author of news article before grand jury seeking to indict him for criminal libel).

The privilege has also been denied where evidence of commission of a crime could be obtained only from the originator of the information furnished in confidence to the reporter. *People ex rel. Mooney* v. *Sheriff of New York County*, 269 N. Y. 291, 199 N. E. 415 (1936) (disclosure, to grand jury investigating gambling and lottery violations, of sources for news articles stating "policy racket" continued in operation).

V.

The state of decisional authority on the question of forced disclosure of confidential news sources points to the need for decision by this Court.

No state court has ever before ordered forced disclosure of news sources after weighing the claim that due process clause guarantees of First Amendment freedoms forbid such disclosure. With the exception of *Garland* v. *Torre*, *supra*, no case has been found in which a federal court has ever rendered such a decision.

The Court of Appeals for the Second Circuit recognized in *Torre* that the type of disclosure here sought may impinge on freedom of the press:

> "As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of

> a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news" 259 F. 2d at 548.

The decision below, though it presents squarely the conflict between an assertion of state interests with such an abridgment of press freedom, discloses no rationale for balancing these competing claims other than a refusal to grant any weight at all to the Constitutional claim (H. Tr. 76).

The importance of the question here presented to the maintenance of an informed citizenry, the paucity of authority on this issue, and the failure of the Colorado Supreme Court to lay down adequate guidelines for future decisions in this area of the law all suggest the propriety of the determination of this case by the Court.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MATHIAS F. CORREA,
80 Pine Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:

C. LEE GOODBAR, JR.,
WILLIAM D. GOODBAR,
EUGENE F. SIKOROVSKY.

January 23, 1961.

APPENDIX A.

IN THE

SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO, 19604 *vs.* JOHN H. GATELY, Attorney Respondent.	ORIGINAL PROCEEDING IN DISCIPLINE

ORDER.

Mrs. Vi Murphy, it is the decision of this court that you are guilty of contempt of this court for your knowing and deliberate refusal to answer lawful and proper questions asked of you by members of this court, and which you have been directed to answer as material to the pending case in suspension now before us; said questions being for you to tell this court when and from whom you procured a copy of the petition in case No. 17217 prior to its filing in this court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that you are guilty of contempt of this court and that you be punished by being placed by the sheriff of the City and County of Denver in its common jail for a period of thirty (30) days.

The clerk of this court is ordered to prepare a mittimus in accordance herewith and furnish same forthwith to said sheriff.

The execution of the mittimus and confinement thereunder to be stayed for a period of ten (10) days hereafter, during which period counsel for Mrs. Murphy may file a brief on this matter within the first five days of said period

and the Attorney General may file a brief within the second five days.

At the expiration of said ten (10) day period Mrs. Murphy shall appear at the office of the said sheriff to begin her sentence. The contemnor to post a personal recognizance bond in the amount of one thousand dollars ($1,000) with the clerk of this court to guarantee her appearance.

By the Court, En Banc, October 26, 1960.

Mr. Justice Knauss dissents.

Mr. Justice Day not participating.

APPENDIX B.

IN THE SUPREME COURT

OF THE

STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO, *vs.* JOHN H. GATELY, Attorney Respondent.	No. 19604 PETITION TO VACATE CONTEMPT ORDER

IN THE MATTER OF AN ORDER ADJUDGING MRS. VI MURPHY IN CRIMINAL CONTEMPT.

COMES Now, Mrs. Vi Murphy, by and through her attorneys, C. Lee Goodbar, Jr., William D. Goodbar and Paul V. Evans, and petitions that this Honorable Court enter an Order vacating the Order of Court dated October 26, 1960, in the above captioned cause adjudging your petitioner in contempt, and

As grounds for this Petition, your petitioner avers and alleges as follows:

I.

That the material requested by questions propounded from the bench of the Colorado Supreme Court as to when and where your petitioner procured a copy of the Petition in Case No. 17217 of this Court prior to its filing in this Court is immaterial and irrelevant to the cause then pending at the time the questions were propounded and for these reasons, to punish your petitioner for declining the answer to an immaterial question would be to deprive her of her liberty without due process of law, contrary to the constitutional guarantees contained in the Colorado Constitution, Article II, Section 25 and The United States Constitution, Amendment XIV, Section 1, as more particularly set forth in the memorandum brief attached hereto;

II.

That the testimony sought to be elicited from your petitioner as to when and where petitioner procured a copy of the petition in Case No. 17217 of this Court, prior to filing in this Court, is protected by the freedom of the press as contained in the Colorado Constitution, Article II, Section 10 and the United States Constitution, Amendment XIV, Section 1, as more fully set out in the memorandum brief attached hereto;

III.

That as a matter of public policy, the evidence sought to be elicited by questions propounded from the Bench as to when and where petitioner procured a copy of the petition in Case No. 17217 of this Court prior to its filing in this Court should fall within a judicially protected area as a privileged communication between a newspaperwoman and her confidential source of information, the rationale of which is more particularly set forth in the memorandum brief attached hereto.

WHEREFORE; Petitioner prays as follows:

1. That this Honorable Court enter an order vacating and setting aside the contempt order affecting your petitioner heretofore entered dated October 26, 1960.

2. For such other and further relief as to the Court may seem just and proper in the premises.

Attorneys for Mrs. Vi Murphy,
404 Exchange National Bank Bldg.,
Colorado Springs, Colorado.

/s/ C. LEE GOODBAR, JR.
C. LEE GOODBAR, JR.

/s/ WILLIAM D. GOODBAR
WILLIAM D. GOODBAR

/s/ PAUL V. EVANS
PAUL V. EVANS

APPENDIX C.

IN THE

SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO, *vs.* JOHN H. GATELY, Attorney Respondent.	No. 19604 ORIGINAL PROCEEDING IN DISCIPLINE

ORDER.

The court having considered the petition filed herein to vacate its order, made and entered October 26, 1960, finding one Vi Murphy guilty of contempt of this court, together with the memorandum of law in support thereof; the petition for an order staying execution of the judgment of contempt entered against the said Vi Murphy, the motion for oral argument of said petitions and the petition of Messrs. Lesher, Schmidt and Van. Cise to appear and file a brief as amici curiae herein on behalf of the Colorado Press Association.

It is ordered that the petition to vacate the contempt order, the motion for oral argument, and the petition for leave to appear as amici curiae be, and they are hereby, denied.

It is further ordered that execution of the aforesaid judgment for contempt be, and it is hereby, stayed for a period of ten days, or to and until November 15, 1960.

IT IS FURTHER ORDERED that at the expiration of said ten (10) days and on, to-wit: the aforesaid fifteenth day of November, A. D. 1960, the Manager of Safety and Excise and ex-Officio Sheriff of the City and County of Denver

take the body of the said Vi Murphy and her safely convey to the common jail of the City and County of Denver, there her safely keep and detain for a period of thirty (30) days according to the judgment of this court heretofore entered herein.

BY THE COURT, EN BANC. November 3, 1960.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1950

No. 672

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 672

VI MURPHY, Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO, Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

We do not think that the questions presented by this case are those stated in the petition. In our opinion the first question is too broad and the second presupposes matters which are not present. We, therefore, submit the following.

QUESTION PRESENTED

Is the imposition of a sanction by a state court upon a newspaper reporter for refusal to divulge, upon an order of the court in a judicial proceeding, the source of his information upon which an article he has published was founded when such source is a fact material and relevant to the issue, an unconstitutional restraint upon the freedom of the press under the Fourteenth Amendment?

REASONS FOR DENYING WRIT

We vigorously disagree with the statements in petitioners petition under the heading "REASONS FOR GRANTING THE WRIT." It would seem from what is there said that the decision of the Colorado Supreme Court was something new — a departure from the previous rule. This is not the case as we will hereafter show and as is in effect later conceded in the petition. There is no adjudicated case in a court of review in any jurisdiction in the United States in which there has been accorded to a newspaper reporter the privilege to refuse to divulge the source of his information respecting an article which he has published. It may be that the Colorado Supreme Court is the first state court in which the constitutional question was raised but that question was raised in the case of *Garland v. Torre*, 259 F. (2d) 545 (2d Cir. 1958), and decided adversely to petitioner's contentions and certiorari was denied by this Court, 358 U.S. 910. The rule that, in the absence of statute, the source of the information must be divulged in a judicial proceeding when the court so orders has been in effect in the United States as long as the constitutional provision providing for freedom of the press and under it the press, in at least thirty-eight states, has apparently been able to function without hinderance. As far as we have been able to ascertain no one in all that time until the *Torre* case ever raised the constitutional provision with respect to it.

The statement that "the communication of news to reporters on condition the source not be disclosed is a constant occurrence" is not supported by any evidence and is one of which we do not believe this Court may take judicial notice.

With all due respect to the press it would seem that

it would be very dangerous to accord the protection requested where the information was properly called for in a judicial proceeding. To do so would be to make it possible for an irresponsible newspaper or other publication to publish supposed *facts* of grave import upon mere rumor from an extremely doubtful source or even from the imagination of the reporter without being required to divulge in a judicial proceeding the source from which the information came or the absence of it. Anonymity with respect to *statements of fact* has never been favored in human relations and to accord protection to the press in preserving it from legitimate judicial inquiry is not only unnecessary to the freedom of the press but could result in undesirable consequences.

In answering the remainder of the petition we shall not follow the order or form of petitioner's arguments, but shall state the points upon which we rely with our arguments in support of them. In passing, however, we are impelled to observe that the cases cited in support of the petition are not in point on the question here presented and the texts are without the authority of judicial decision.

ARGUMENT

I

THE QUESTIONS TO PETITIONER WERE MATERIAL, RELEVANT AND ESSENTIAL.

Mr. Gately, the lawyer whose conduct was under investigation, was examined outside of the presence of the witnesses on both sides. He admitted that a copy of the petition, which was the subject of the inquiry, had come into the possession of the Gazette-Telegraph, but stated that this happened when the petitioner here took it from him in the clerk's office at the time he filed it and that he

had not given a copy to anyone else except the opposing attorneys in the case in which it was filed (H. Tr. 42-44).

The petitioner here was afterwards questioned in the presence of Mr. Gately. She admitted that she was the author of the story which appeared in her newspaper. She testified that the original information came from a "news tip" which she received about two days before Gately's petition was filed; that she questioned Gately about it on the afternoon before the petition was filed but he refused to discuss the matter with her (H. Tr. 72-73); and that she had a copy of Gately's petition before her when she wrote the story early in the morning of the day and before it was filed in Court (H. Tr. 79-80). She was asked if Mr. Gately had showed her a copy of the petition on September 1st, the day before it was filed, which question she refused to answer because her answer might lead to the disclosure of a news source and she would "like to stand under the first amendment of the Bill of Rights, which guarantees us freedom of the press." (H. Tr. 74-76, 79). The petitioner here again refused to answer at a subsequent hearing whether Mr. Gately had showed her a copy of the petition at any time prior to filing it in Court and refused to answer for the same reasons (H. Tr. 248-249).

The question as to whether the petitioner here received from Mr. Gately or was shown by him a copy of his petition before it was filed was material and relevant for two reasons — first, because Mr. Gately was charged with giving the petitioner a copy of his petition for the purpose of having its contents published in a newspaper for the purpose of obtaining publicity for himself which he believed would be favorable to him and for the further purpose of bringing disgrace upon the Supreme Court of Colorado and its members; and second, because Mr. Gately

testified that he did not give a copy of his petition to petitioner before it was filed, that she obtained it by taking it from him at the time he filed it, and that the copy she had before the filing did not come from him.

The motives of Mr. Gately in drafting, swearing to and filing the petition were of peculiar significance. Either he was attempting in what he believed to be good faith to obtain justice for his client which the publicity in a newspaper would do nothing to help, or he was attempting to obtain what he thought would be desirable publicity for himself. If he gave a copy of his petition to petitioner in sufficient time before he filed it to enable her to write her story before it was filed, he was by his testimony attempting to deceive the Court and this was a matter of vital importance, especially in a proceeding where his professional conduct was being examined.

In the petition it is conceded on pages 18 and 19 that the answers sought from petitioner were relevant "if it were Gately, or someone acting under his direction, who supplied petitioner with a copy of the petition." This is exactly what the Colorado Supreme Court was endeavoring to ascertain, and more specifically if it was Gately who supplied the copy of his petition. The argument that the elicitation of the information was not essential to the Court's decision, especially in view of the fact that Gately was nevertheless suspended without the obtaining of the information, in our opinion is without force. The Court wanted and was entitled to all material and relevant information and was not obliged to rely upon circumstantial evidence if direct evidence could be obtained. Certainly no one can properly contend that a party or court is not entitled to the fullest quantum of proof. Because some evidence to a fact has been produced does not render addi-

tional evidence of a different kind immaterial or irrelevant. Circumstances in aggravation are always admissible where they may be considered by the court in the imposition of a penalty or sanction or where as here the court was considering a grave step — the suspension of an attorney from practice during the pendency and before the determination of disbarment proceedings. The Court desired the whole truth as to the attorney's conduct and was entitled to it.

II

IN THE ABSENCE OF STATUTE THERE IS NO PRIVILEGE OF NON-DISCLOSURE OF A NEWS SOURCE BY A NEWSPAPER REPORTER.

This has been held in the following cases:

Clein v. State, 52 So. 2d 117 (Fla. 1951); *Plunkett v. Hamilton*, 136 Ga. 72, 70 S.E. 781 (1911); *In Re Wayne*, 4 U.S. D.C. Hawaii 475 (D. Hawaii 1914); *Brewster v. Boston Herald-Traveler Corp.*, 20 F.R.D. 416 (D. Mass. 1957); *Pledger v. State*, 77 Ga. 242, 3 S.E. 320 (1887); *Ex parte Holliway*, 272 Mo. 108, 199 S.W. 412 (1917); *People ex rel Phelps v. Faucher*, 2 Hun 226 (N.Y. Sup. Ct. 1874); *People ex rel Mooney v. Sheriff of New York County*, 269 N.Y. 291, 199 N.E. 415 (1936); *Ex parte Lawrence*, 116 Cal. 298, 48 P. 124; *Garland v. Torre*, *supra*.

No cases to the contrary are cited in the petition, and since we have been unable to find any we feel justified in saying there is no court of review in any jurisdiction in the United States which has held to the contrary.

III

THE PROPER ADMINISTRATION OF JUSTICE BY THE DISCOVERY AND DETERMINATION OF THE TRUTH IN A JUDICIAL PROCEEDING MUST TAKE PRECEDENCE OVER ANY INCIDENTAL INTERFERENCE WITH THE FREEDOM OF THE PRESS BY REQUIRING THE DISCLOSURE OF NEWS SOURCES.

This is the direct answer to the question we have heretofore presented for the Court's determination of whether certiorari should be granted.

The duty of a person, when summoned as a witness, to attend and testify and the importance of the performance of that duty for the proper administration of justice has been stated as follows:

> "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule:
>
> "1. From the point of view of the *duty* here predicated, it emphasizes the sacrifice which is due from every member of the community. That sacrifice may take two forms, either of them serious enough:

"In the first place, it may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him, when it requires to.

"Or the sacrifice may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. This inconvience which he may suffer, in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavoring action of fellow-members of the community, is also a contribution which he makes in payment of his dues to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognize that it defines an unmistakable axiom. When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon." Wigmore on Evidence (3rd Ed.) Vol. 8 Sec. 2192 pp. 64-66.

Blair v. United States, 250 U.S. 273, 281-282:

"In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of government (Wilson v. United States, 221 U.S. 361, 372, quoting Lord Ellenborough), is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself, entitling the witness to be excused from answering anything that will tend to incriminate him (see Brown v. Walker, 161 U.S. 591); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

"But aside from exceptions and qualifications — and none such is asserted in the present case — the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

"He is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for

this is no concern of his. Nelson v. United States, 201 U.S. 92, 115.

"On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided they have a *de facto* existence and organization.

"He is not entitled to set limits to the investigation that the grand jury may conduct."

This case was cited and approved on the same point in *Blackmer v. United States*, 284 U.S. 421, 438.

As applied to newspaper reporters and the sources of their information it has been said:

Plunkett v. Hamilton, 70 S.E. 781, 136 Ga. 72, 83:

"The citizen or inhabitant owes to the state the duty of testifying, when lawfully called upon to do so, in order that the truth may be ascertained and impartial and complete justice be done. Omitting any reference to instances which are expressly excepted, the law requires a witness to testify, when duly summoned before a court having jurisdiction, and called upon to give competent and relevant evidence. A promise not to testify when so required is substantially a promise not to obey the law. Such promises cannot be recognized, save in subordination to the requirements of the law. If the views sought to be maintained in this case were permitted to prevail, the power to ascertain the truth in judicial investigations, and to administer justice accordingly, would depend, not upon the law of the land, but upon the private promises of secrecy on the part of witnesses, or upon the wishes or orders of their employers. To sustain

such a doctrine would render courts impotent and the effort to administer justice oftentimes a mockery."

In Re Grunow, 86 A. 1011, 84 N.J. Law, 235, 236:

"Such an immunity, as claimed by the defendant, would be far-reaching in its effect and detrimental to the due administration of law. To admit of any such privilege would be to shield the real transgressor and permit him to go unwhipped of justice."

In Re Waque, 4 Hawaii District Court, 475, 476:

"In the opinion of the court, the position of the witness is untenable. Though there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information, — a canon worthy of respect and undoubtedly well founded, it is subject to qualification; it must yield when in conflict with the interest of justice,'— the private interests involved must yield to the interests of the public."

Garland v. Torre, supra, is the only case we have been able to find in which the constitutional provision respecting the freedom of the press was asserted as superseding the general rule that a newspaper reporter is required to divulge the source of his information upon which an article he published was predicated.

In that case Judy Garland, an actress, brought an action against Columbia Broadcasting System on two claims, one for breach of contract and the other alleging that the defendant had made false and defamatory statements about her and had authorized, requested and induced their publication in newspapers and elsewhere. As an example of such a publication she annexed as an exhibit to her complaint a few paragraphs from an article written by Marie Torre and published in a New York news-

paper. In this article Miss Torre attributed to a CBS "network executive" several statements about Miss Garland which, the complaint alleged, were false, defamatory and highly damaging to Miss Garland's professional reputation. CBS denied in its answer the making of the statements or causing them to be published.

In a discovery proceeding Miss Garland's counsel took Miss Torre's deposition. Upon interrogation Miss Torre refused to give the name of the "network executive" who she said had made the statements, "asserting that to do so would violate a confidence."

Proceedings were then brought in the District Court to compel Miss Torre to disclose the name of her informant. Upon her refusal in the presence of the Court to do so, she was held in criminal contempt and she appealed to the Circuit Court of Appeals of the Second Circuit which affirmed the judgment of the District Court.

In its opinion the Circuit Court of Appeals, on the following pages of 250 F. 2d, said:

> "Three alternative arguments are advanced in support of the appellant's position that it was error to require her to disclose in these pre-trial proceedings the identity of a confidential news source. The first contention is a Constitutional one — to compel newspaper reporters to disclose confidential sources of news would, it is asserted, encroach upon the freedom of the press guaranteed by the First Amendment, because 'it would impose an important practical restraint on the flow of news from news sources to news media and would thus diminish *pro tanto* the flow of news to the public.' Secondly, it is urged that quite apart from any Constitutional question, the societal

interest in assuring a free and unrestricted flow of news to the public should impel this court to hold that the identity of a confidential news source is protected by at least a qualified privilege. (Pages 547-548)

* * *

"As to the Constitutional issue, we accept at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgment of press freedom by imposing some limitation upon the availability of news. (Page 548)

* * *

"But freedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First-Amendment freedom. (Page 548) * * *

"But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

"It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. (Pages 548-549)

* * *

"Whether or not the freedom to invoke this judicial power be considered an element of Fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy. As Chief Justice Hughes put it: '(O)ne of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.' (Page 549)

* * *

"If an additional First Amendment liberty — the freedom of the press — is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice. 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.' * * * This, as Mr. Justice Frankfurter has pointed out in a somewhat different context, 'has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures.' (Page 549)

* * *

"The privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify. Even those few situations to which the law has long accorded this privilege have been seriously questioned. It has been emphasized

that the tendency should be not to extend the classes to whom the privilege from disclosure is granted, but to restrict that privilege.'"
(Page 550)

Thus, the opinion in this case fully and directly refutes each and every contention in the present petition.

We respectfully submit that there is no distinction between the above case and the one at bar which should impel this Court to grant certiorari here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

DUKE W. DUNBAR,
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Attorney for Respondent.

Of Counsel:
Frank E. Hickey,
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State Capitol,
Denver 2, Colorado

February, 1961

FILE COPY

No. 672.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

VI MURPHY,

Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITIONER'S REPLY BRIEF.

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March 7, 1961.

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VI MURPHY,

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PEOPLE OF THE STATE OF COLORADO,

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PETITIONER'S REPLY BRIEF.

Respondent's brief* emphasizes four assertions. First, respondent says the questions to petitioner were "material, relevant and essential", despite the fact that the concededly "grave step" of Gately's suspension during the pendency of disbarment proceedings was taken by the Colorado court without having heard the answers to those questions. Second, the brief states that a reporter has no privilege of nondisclosure of a confidential news source in the absence of statute, though respondent declares, with petitioner, that until *Garland v. Torre*, 259 F. 2d 545 (2d Cir. 1958), *cert. denied*, 358 U. S. 910, the question whether the Constitutional guarantee of freedom of the press protects the reporter against disclosure had not even been considered in the cases so holding. Third, respondent seems to urge

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* Referred to herein as "Br. Opp."

that the continued prospect of forced disclosure of confidential news sources is desirable as a means of policing the utterances of the public press. Fourth, respondent asserts that in this situation "the proper administration of justice . . . must take precedence over any incidental interference with the freedom of the press." Whether it must take precedence in a case such as this is a question left unanswered by respondent's arguments and authorities, and is one form of statement of the important question which petitioner claims should be decided by this Court, following the grant of this petition.

Petitioner's Answers to the Questions of the Court Below Could Not Have Been "Material, Relevant and Essential".

As pointed out in the petition herein (pp. 18-20), the decision below, the contentions of the Colorado Attorney General below, and the provisions of the governing Colorado statute all make it clear that, although petitioner's testimony might have been thought relevant to the inquiry, it could hardly have been material, and surely was not essential to the outcome of the proceeding. Respondent (Br. Opp., p. 6) suggests that "circumstances in aggravation are always admissible where . . . the court was considering a grave step--the suspension of an attorney from practice . . .". But one seeks in vain to know what additional sanction or penalty could have been imposed on Gately, in the light of the pleadings below, if petitioner had testified that she received a copy of the petition in question from Gately.

Respondent's argument that the Colorado court was entitled to the "whole truth as to the attorney's conduct" (Br. Opp., p. 6) begs the question. As will be shown below, the authorities cited by respondent recognize that there are

limitations to the rule that testimony may be compelled. Petitioner's position is that in the balancing of interests the Constitutional guarantee of a free press is an appropriate limitation of that rule, and that the propriety of the limitation is particularly clear where, as here, the testimony sought to be compelled would not have affected the result of the proceeding.

Respondent's Authorities do not Settle the Question in This Case.

Though petitioner does not question, as a general rule, the "fundamental maxim that the public . . . has a right to every man's evidence" (Br. Opp., p. 7), the quotations in respondent's brief affirmatively show that inquiry does not end with the statement of the maxim:

> "... When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that *it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused;* ... The duty runs on throughout all, and does not abate; *it is merely sometimes not insisted upon.*"* 8 Wigmore, Evidence [3d Ed.] §2192 (Br. Opp., p. 8).

And in *Blair* v. *United States*, 250 U. S. 273, 281 (1919) (quoted in Br. Opp., pp. 9-10) this Court made clear that the witness claimed the benefit of no exception or qualification to the general obligation to testify, though the Court acknowledged that:

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* Emphasis supplied throughout.

> ". . . some confidential matters are shielded from considerations of policy, *and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.*"

Neither *Blair,* nor *Blackmer* v. *United States,* 284 U. S. 421 (1932) (Br. Opp., p. 10), involved a newspaper reporter or freedom of the press. Moreover, both cases decided that a witness had no standing to challenge matters affecting solely the Constitutional rights of the accused in the proceedings. They do not stand for the proposition that a witness may not challenge the right to compel testimony, as petitioner did here, where the witness' Constitutional right not to testify is asserted.

The right to withhold testimony thought by the court in *In Re Grunow,* 84 N. J. L. 235, 236, 85 Atl. 1011, 1012 (1913) (Br. Opp., p. 11) to be ". . . far-reaching in its effect, and detrimental to the due administration of law" has for a number of years, subsequent to the decision in *Grunow,* been assured to newspaper men by statute in New Jersey, by legislatures which apparently disagreed with that court's conclusions. N. J. S. A. 2A:84A-21 (1960).

Respondent's quotations from *Plunkett* v. *Hamilton,* 136 Ga. 72, 83, 70 S. E. 781 (1911) and *Matter of Wayne,* 4 U. S. D. C. Hawaii 475, 476 (1914) (Br. Opp., pp. 10-11) show only that private agreements and journalistic ethics as such may not prevail over the interest of the public in full testimony. Those cases, like the other state cases cited by respondent, do not touch upon the question whether the Constitutionally-protected interest of the public in receiving all the news is also subordinate to its interest in full disclosure in judicial proceedings.

It is because this question is left unanswered in the state cases and unanswered by this Court that certiorari should be granted in this case.

Freedom of the Press May Not be Impaired on the Possibility That Publications of an Irresponsible Newspaper "Could Result in Undesirable Consequences".

Respondent argues (Br. Opp., pp. 2-3) that according to the press the protection requested by petitioner would be "dangerous," that an "irresponsible newspaper" could as a consequence publish "supposed facts of grave import" upon rumor "from an extremely doubtful source" without having to divulge the source, and that to accord protection to the press in preserving anonymity with respect to statements of fact "could result in undesirable consequences." Apparently the undesirable consequences referred to are the possibilities of public alarm and the loss of prestige of public officials. At the outset it should be noted that the only "supposed fact" published here was the undeniable fact that John Gately had filed a petition in court making charges against a former judge. But respondent's objection goes to the airing of the charges themselves, no matter how accurate the charges, and no matter how beneficial to the public good the publication may be. Respondent would deny the protection of news sources which the petition (pp. 8-14) shows to be vital to the press' ability to gather the news, especially news of this nature.

The notion that the right to publish charges of misconduct in office must be made to depend on the certain determination prior to publication of the accuracy and correctness of such charges has been refuted by this Court. In *Near* v. *Minnesota*, 283 U. S. 697, 719-720 (1931) the Court said:

> "While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful

> influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

The press must be immune from indirect, as well as direct, restraints on its ability to publish the news.

Neither petitioner nor her newspaper took the position at the time of publication in the article in question that Gately's charges had been proved, nor does respondent claim that petitioner's newspaper is irresponsible or that the content of the article derived from petitioner's imagination. In discussing the question, respondent correctly recognizes that the principle involved, and the future consequences of the decision herein, have an importance transcending the disposition of the case at hand.

The petition for certiorari suggests that the nature of the publication in this case and the minimal governmental interest here in disclosure of the confidential news source so distinguish this case from *Torre, supra* that the decision of the Court of Appeals in that case cannot be regarded as controlling here.

The impossibility of undertaking to keep news sources confidential, under the rule of the decision below, is a real

and dangerous restraint on news gathering. The ability to gather news is as essential to a free press as the right to publish news. Freedom of the press is a prerequisite to the proper functioning of a free society, and occupies a preferred place under the Constitution. Whether or not freedom of the press is to prevail, and under what conditions, over the public interest in obtaining the fullest possible disclosure in judicial proceedings is an important issue, presented by this case, deserving of consideration and decision by this Court.

Respectfully submitted,

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